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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
JAMES A. LARSON f/d/b/a)	DOCKET NO. CAA-
(113) - VIII - 98 - 09)	
AA GARAGE,)	
)	
RESPONDENT)	

ORDER ON COMPLAINANT'S MOTIONS TO TAKE OFFICIAL NOTICE OF AFFIDAVIT OF CHRISTINE DIBBLE AND FOR LEAVE TO SUBMIT VERIFIED STATEMENT OF CAROL SMITH FOR USE AT HEARING

This proceeding arises under the authority of Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. Part 22. ⁽¹⁾ A hearing in this matter is scheduled for September 1 and 2, 1999, in Cheyenne, Wyoming.

On August 3, 1999, the Complainant, the United States Environmental Protection Agency ("EPA"), filed a Motion to Take Official Notice of Affidavit of Christine Dibble. In this motion, the Complainant requests that official notice be taken of the information contained in the July 15, 1999, affidavit of Christine Dibble which is attached to the motion as Complainant's Exhibit 1. Ms. Dibble, who is the Motor Vehicle Air Conditioning Coordinator for the Stratospheric Protection Division, Office of Atmospheric Programs, Office of Air and Radiation of the EPA, states that since becoming the Motor Vehicle Air Conditioning Coordinator in 1994, one of her primary duties has been to maintain the EPA's list of recovery/recycling equipment

certified by the EPA or an independent standards testing organization to meet the standards set forth in 40 C.F.R. § 82.36 (EPA's List of Section 609 Approved Equipment or the "List"). Ms. Dibble further states that during the time she has been maintaining the List since 1994, Robinair Model #10854 has not been on the List, and to the best of her knowledge, Robinair Model #10854 has never been on the List. Ms. Dibble notes that Robinair Model #10854 is not on the List because it is not recovery/recycling equipment certified by the EPA or an independent standards testing organization to meet the standards in 40 C.F.R. § 82.36.

Section 22.22(f) of the Rules of Practice, 40 C.F.R. § 22.22(f), provides that:

Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

The EPA maintains that the information contained in Ms. Dibble's July 15, 1999, affidavit (Complainant's Exhibit 1) is within her specialized knowledge and experience as the Motor Vehicle Air Conditioning Coordinator and, therefore, moves that official notice be taken of this information. I agree that the factual matters contained in Ms. Dibble's affidavit are appropriate for official notice. Moreover, the Respondent has not challenged the information contained in Ms. Dibble's affidavit. Accordingly, official notice is taken of the following facts: Since at least 1994, Robinair Model #10854 has not been on the list of recovery/recycling equipment certified by the EPA or an independent standards testing organization to meet the standards set forth in 40 C.F.R. § 82.36; and that to Ms. Dibble's knowledge, Robinair Model #10854 has never been on that list. As such, the EPA's Motion to take official notice is **Granted**.

On August 4, 1999, the Complainant filed a Motion for Leave to Submit Verified Statement of Carol Smith for Use at Hearing. In this motion, the EPA, pursuant to 40 C.F.R. §§ 22.16(a) and 22.22(c), moves for leave to submit the verified statement of EPA Environmental Engineer Carol Smith for use at the hearing in this matter, which is scheduled for September 1, 1999. The EPA states that the verified statement "would contain all or a portion of the testimony Ms. Smith would give at hearing."

Section 22.22(f) of the Rules of Practice, 40 C.F.R. § 22.22(f), provides that:

The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

This regulation does not require that a party be granted leave to obtain and proffer a verified statement of its witness. This is not to say, however, that a moving party should not provide the opposing party adequate opportunity to review the verified statement prior to the statement being offered into evidence at the hearing. Inasmuch as the hearing has not been convened and the statement of Ms. Smith has not been proffered, the EPA's motion is premature at this time. The

motion therefore is **Denied**.

The EPA's motion prompts the following observation. The EPA's prehearing exchange reflects that Ms. Smith is the EPA's primary witness. Although the regulations allow for the admission of statements of fact or opinion prepared by a witness in lieu of oral testimony, the EPA is advised that the Respondent, who is appearing pro se, will be afforded full opportunity to review the statement before proceeding. A lengthy or detailed statement proffered at the last minute requiring substantial time to review will not promote judicial economy. As such, the efficacy of the EPA's motion, if renewed, should be fully assessed before any verified statement is proffered.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 8-20-99
Washington, DC

1. The Rules of Practice are revised effective August 23, 1999. Proceedings commenced before August 23, 1999, are subject to the revised Rules of Practice unless to do so would result in substantial injustice.

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